190

FILED
JUL 24 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 07-1600

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES E. ALLISON and FLORA ALLISON,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL S. ROGERS
Counsel of Record
REED McCLURE
TWO UNION SQUARE
601 UNION ST., SUITE 1500
SEATTLE, WA 98101-1363
(206) 292-4900

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, whose correct name is State Farm Mutual Automobile Insurance Company, is an Illinois Corporation. It has no parent corporation, and no publicly held company owns more than 10% of its stock.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6 i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS WHY PETITION SHOULD BE DENIED 4

A. THE NINTH CIRCUIT CORRECTLY HELD THE DISTRICT COURT HAD NO JURISDICTION TO REVIEW STATE COURT DECISIONS 4

B. PETITIONERS ARE NOT CHALLENGING WASHINGTON'S JURY SELECTION PROCESS 6

C. PETITIONERS HAD AMPLE OPPORTUNITY TO RAISE THEIR FEDERAL CLAIMS IN STATE COURT 7

D. EVEN IF *ROOKER-FELDMAN* DID NOT APPLY, THE RESULT WOULD BE THE SAME BECAUSE PETITIONERS HAVE NOT ALLEGED STATE ACTION BY STATE FARM 10

E. EVEN IF *ROOKER-FELDMAN* DID NOT APPLY, THE RESULT WOULD BE THE SAME BECAUSE PETITIONERS § 1983 CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS 14

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Page

Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)..... 11

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983)..... 1, 4, 5, 6, 7, 8, 10, 14

Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991)..... 11, 12

Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)..... 5

Georgia v. McCollum, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)..... 12

Long v. Shorebank Development Corp., 182 F.3d 548 (7th Cir. 1999)..... 8, 9

Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)..... 12, 13

Morales v. City of Los Angeles, 214 F.3d 1151 (9th Cir. 2000)..... 14

Noel v. Hall, 341 F.3d 1148 (9th Cir. 2003)..... 7

Owens v. Okure, 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989) 14

Petcu v. State, 121 Wn. App. 36, 86 P.3d 1234, *rev. denied*, 152 Wn.2d 1033 (2004) 14

Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923) 1, 4, 5, 6, 7, 8, 10, 14

Wilson v. Garcia, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985) 14

Wood v. Orange County, 715 F.2d 1543 (11th Cir. 1983) 8

Constitutions

U.S. CONST. amend. V 1

U.S. CONST. amend. VI 1

U.S. CONST. amend. VII 1

U.S. CONST. amend. XIV 1, 4, 13

WASH. CONST. art 1, § 3 9

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. §1332 1

28 U.S.C. §1343(a)(3) 1, 11

42 U.S.C. § 1983 ..... 10, 12, 14

WASH. REV. CODE §4.16.080(2) 14

WASH. REV. CODE §4.44.170 7

WASH. REV. CODE §4.44.180 7

JURISDICTION

Petitioners seek review of a decision of the Ninth Circuit court of appeals affirming a federal district court decision. This case did not originate in state court. This court already denied certiorari of the separate state court proceeding. Jurisdiction here is based on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners alleged in their complaint in federal district court that in a different lawsuit, a Washington state court erred in seating certain jurors over their objections. Petitioners alleged their constitutional rights were violated. Petitioners asked the federal district court to review those decisions.

The district court dismissed petitioners' complaint for lack of jurisdiction and failure to state a claim. (Petitioners' App. at 5a) The district court lacked federal question jurisdiction to review a state court decision under the *Rooker-Feldman* doctrine. The district court lacked jurisdiction under 28 U.S.C. § 1343(a)(3) and the Fourteenth Amendment to the United States Constitution because State Farm did not act under color of state law. The Fifth and Seventh Amendments provided no jurisdiction because they limit only powers excercised by the federal government, and the Sixth Amendment provided no jurisdiction because it applies only to criminal prosecutions. The district court lacked diversity jurisdiction because petitioners made no showing of the amount in controversy required by 28 U.S.C. § 1332.

The Ninth Circuit Court of Appeals affirmed in an unpublished memorandum decision. (Id. at 1a)

Petitioners alleged in their complaint that petitioner James Allison was involved in an auto accident. State Farm denied coverage. Petitioners sued State Farm in Washington State district court. (Record 4-5 – Complaint pp. 3-4)

At trial in June 2001, petitioners' lawyer allegedly objected to the presence of State Farm policyholders on the jury. The judge allowed them to stay on the jury "despite strenuous objection and motions" by petitioners' counsel. (Record 4, 9-12 – Complaint pp. 3, 8-11) Petitioners failed to put their juror challenges on the record. (Appellants' Ninth Circuit Brief at 7, 8)

At trial, the jury found State Farm breached its contract and had to provide coverage for a portion of James Allison's losses. Petitioners appealed to superior court, which affirmed the judgment. The Court of Appeals and Washington Supreme Court denied review. (Record 5 – Complaint p. 4)

The matter was remanded back to state district court, where the court denied the request of both petitioners for attorney fees. (Record 5-6 – Complaint pp. 4-5) The court denied the motion for fees because of misrepresentations made in connection with the insurance claim investigation. The court ruled that this conduct was inequitable, breached the contract, violated public policy, and prejudiced State Farm. (Record 60-64)[1]

---

[1] The district court considered the decision of the state district court denying petitioners' motion for attorney's fees. (Record 60-64) Petitioners referred extensively to this document in their complaint. (Record 5-6, 18 – Complaint pp. 4-5, 17)

> It is abundantly clear from the trial record in this case that Plaintiffs have come before this court requesting attorney fees and costs with "unclean hands." The material misrepresentations of facts and circumstances made by Plaintiffs to Defendant in connection with the insurance claim investigation of purported damage to Plaintiffs' vehicle violated the terms of the insurance contract, as well as the public policy of this state and were prejudicial to the Defendant. None of the factors set forth in the Olympic Steamship case to form an [sic] basis for an award of attorney fees are present in this case. Plaintiffs' own acts preclude an award of attorney fees under the equitable grounds upon which the Olympic Steamship case is based.

(Record 64)

Petitioners appealed again to superior court. The superior court affirmed. The Court of Appeals and Washington Supreme Court denied review. (Record 5-6, 18 – Complaint pp. 4-5, 17)

Petitioners filed a petition for certiorari with the United States Supreme Court on the issues of "fair juries, jury thinking on misrepresentation without ever being asked to make such a finding, and fees to a separate party spouse." The Supreme Court denied certiorari. (Record 6 – Complaint p. 5)

Petitioners complained their due process rights under the United States Constitution were violated because the jury was biased. (Record 7, 9 –

Complaint pp. 6, 8) They complained they were damaged by "the positions [State Farm] has taken in litigation throughout the history of this matter, and its failure to provide full insurance coverage and pay for all of Plaintiffs attorney fees and costs." (Record 21 – Complaint p. 20)

Petitioners did not plead any specific cause of action against State Farm. Instead, they asserted that the federal district court had "jurisdiction to review a highest state court decision." (Record 3 – Complaint p. 2) They asked the district court to order a new trial, and to "remand to the state courts for all possible remedies and relief." (Record 22 – Complaint p. 21)

REASONS WHY PETITION SHOULD BE DENIED

A. THE NINTH CIRCUIT CORRECTLY HELD THE DISTRICT COURT HAD NO JURISDICTION TO REVIEW STATE COURT DECISIONS.

The Ninth Circuit correctly held that under the *Rooker-Feldman* doctrine, the district court had no jurisdiction to review state court decisions. In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923), the plaintiff filed an action in federal district court seeking to do precisely what petitioners attempt to do in this action. They asked the court to rule that a state court judgment was null and void because it was rendered and affirmed in violation of the due process and equal protection clauses of the Fourteenth Amendment. The district court held it had no jurisdiction, and this Court affirmed.

> Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character. . . . To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.

Rooker, 263 U.S. at 416 (citations omitted).

In *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005), this Court further defined the parameters of the doctrine. *Rooker-Feldman* applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon*, 544 U.S. at 284.

This case falls squarely within *Rooker-Feldman*. Petitioners lost in state court. They petitioned this court for review, and were denied. They later filed suit in federal court complaining they were injured by entry of the state court judgment, because it was based on a jury verdict that violated their right to due process. They asked the federal court to "review" the state court judgment, and reverse it. In their brief opposing State Farm's motion to dismiss, they stated:

> State Farm does not dispute the right of the United States Supreme Court here earlier to review the state court decisions through the highest state court. This was done here, but certiorari was denied. Now the review for constitutional violations under federal

> practice can start again at the United States District Court level, and if necessary, reviewed through the circuit courts of appeals and then back to the United States Supreme Court. This . . . is our system of checks and balances among the court systems to right United States Constitutional and statutory wrongs imposed through the state system.

(Record 68-69) Petitioners also asserted that the district court had authority to "order a new trial or order the state court system to review the various issues." (Record 77)

Petitioners' first question presented again asserts that "federal courts have jurisdiction to review state court decisions." (Petition for Certiorari at i) Under *Rooker-Feldman*, the federal district court had no jurisdiction to conduct such a review. The Court of Appeals properly affirmed dismissal of petitioners' complaint.

B. PETITIONERS ARE NOT CHALLENGING WASHINGTON'S JURY SELECTION PROCESS.

Petitioners assert that the Ninth Circuit's decision conflicts with a Fourth Circuit case because *Rooker-Feldman* divests a district court of jurisdiction to review a state court decision, but not to consider a challenge to the constitutionality of the process by which a state court decision was reached. However, petitioners have not claimed that Washington's jury selection procedures are unconstitutional. Instead, petitioners asserted that the state judge "simply violated the state law

regarding impartial jury selection." (Appellants' Ninth Circuit Brief at 16) They claim their injury was caused by "the trial court's decision." (Petition for Certiorari at 16) Petitioners point to no Washington procedure that prevented them from challenging prospective jurors based on bias.

Indeed, Washington law expressly permits litigants to challenge for cause prospective jurors who are biased. WASH. REV. CODE §4.44.170. Bias is defined to include an interest on the part of the juror in the event of the action, or the principal questions therein. WASH. REV. CODE §4.44.180. Petitioners even quote these statutes in their petition for certiorari, at pages 6-7. Petitioners do not identify any state statute or rule they claim is unconstitutional.

Petitioners simply asserted that the state court judge made the wrong decision under Washington's procedures. They asked the district court to "review" that decision. The Ninth Circuit correctly held the district court had no jurisdiction under *Rooker-Feldman*.

C. PETITIONERS HAD AMPLE OPPORTUNITY TO RAISE THEIR FEDERAL CLAIMS IN STATE COURT.

Petitioners assert that the Ninth Circuit's decision conflicts with decisions by the Seventh Circuit and other courts because *Rooker-Feldman* does not apply where a litigant had no reasonable opportunity to raise federal constitutional claims in state court. This argument is surprising because the Ninth Circuit has approved the formulation of *Rooker-Feldman* used by the Seventh Circuit. *Noel v. Hall*, 341 F.3d 1148, 1164-65 (9th Cir. 2003). In fact,

in this case the Ninth Circuit expressly recognized this limitation on *Rooker-Feldman*, and ruled that petitioners did have a reasonable opportunity to raise in state court the issues they raise now. (Petitioners' App. at 3a-4a) There is no conflict with other circuits.

Petitioners' reliance on *Wood v. Orange County*, 715 F.2d 1543, 1545-46 (11th Cir. 1983), is misplaced. There, liens were entered without any prior notice to the federal court plaintiffs. Here, petitioners had notice. They filed the state court action. They demanded the jury. The trial was for their own claims against State Farm.

Petitioners' situation bears no comparison to that of the tenant in *Long v. Shorebank Development Corp.*, 182 F.3d 548 (7th Cir. 1999). There, the tenant brought a claim for wrongful eviction in violation of federal and state laws. She alleged that a landlord evicted her for nonpayment of rent at an ex parte hearing. She claimed the landlord's attorney tricked her into signing a document she was told would preclude the landlord from taking action against her to obtain a judgment, but was in fact consent to entry of judgment against her.

The Seventh Circuit held that *Rooker-Feldman* is jurisdictional, and broadly "applies not only to claims that were actually raised before the state court, but also to claims that are inextricably intertwined with state court determinations." *Long*, 182 F.3d at 554-55. However, "an issue cannot be inextricably intertwined with a state court judgment if the plaintiff did not have a reasonable opportunity to raise the issue in the state court proceedings." *Id.* at 558. Interestingly, the court held that the alleged "chicanery" of the landlord's attorney was not enough to show the tenant was denied a reasonable

opportunity to raise her claims in state court. The tenant would have to point to some factor independent of the actions of the opposing party. *Id.* The tenant satisfied this requirement because Illinois law did not allow a tenant to raise matters unrelated to possession in a forcible entry and detainer proceeding. *Id.* at 559.

In contrast to the tenant in *Long*, petitioners had ample opportunity to argue to the state court that their due process rights were violated by the denial of their juror challenges. Petitioners attached as exhibits to their complaint twenty pages of transcript from two separate state court hearings where their attorney vigorously voiced his displeasure with the court's denial of his clients' challenges for cause. (Record 24-43) Their attorney cited case law to the state judge to support his position that Washington law required that the court grant his juror challenges. (Record 34, 41; *See also* Appellants' Ninth Circuit Brief at 8)

The Washington Constitution provides protections at least as broad as the United States Constitution. It provides that no person shall be deprived of life, liberty, or property without due process of law. WASHINGTON CONSTITUTION, art. 1, § 3. Petitioners quote this provision in their petition for certiorari, at 6. Petitioners fail to articulate any reason why they were unable to raise constitutional due process protections under the federal or state constitutions with the Washington courts.

Petitioners' comparison of this case to situations where a judge was biased or bribed is specious. Petitioners complain here of the denial of their juror challenges. That denial was made by the state court judge, not the allegedly biased jurors.

Petitioners do not allege that the judge who denied their juror challenges was biased. Petitioners had every opportunity to raise their constitutional challenges to the state court judge.

If petitioners failed to raise a constitutional issue, their failure was due to their own omission, not to lack of opportunity. Such failure would not alter the federal court's lack of jurisdiction. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 n.16, 103 S. Ct. 1303, 1316 n.16, 75 L. Ed. 2d 206 (1983). However, petitioners told the federal district court that they raised their constitutional issues before the state courts. They admitted that "all the constitutional issues here have been in litigation for years." (Record 79) They raised the constitutional issues before the state appellate courts, and before the United States Supreme Court on their petition for certiorari. (Record 78)

Therefore, the Ninth Circuit's decision does not conflict with other cases that address situations where litigants had no reasonable opportunity to raise federal constitutional claims in state court.

D. EVEN IF *ROOKER-FELDMAN* DID NOT APPLY, THE RESULT WOULD BE THE SAME BECAUSE PETITIONERS HAVE NOT ALLEGED STATE ACTION BY STATE FARM.

As the district court held, the result would be the same even if *Rooker-Feldman* did not apply. Petitioners' claim under 42 U.S.C. § 1983 would fail because they have not alleged state action by State Farm. Therefore, even if there was a conflict between the circuits, this Court should deny certiorari.

Section 1983 requires proof of two elements. First, the plaintiff must prove that the defendant has

deprived the plaintiff of a right secured by the Constitution and laws of the United States. Second, the plaintiff must show that the defendant deprived him of this right under color of state law. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). The "under color of any State law" requirement is jurisdictional. 28 U.S.C. § 1343(a)(3).

Neither element is present. First, petitioners alleged that the state court, not State Farm, deprived them of due process when the court denied their requests to strike biased jurors. Petitioners merely alleged they were harmed by State Farm's litigation positions. As a matter of law, a private party that takes litigation positions in a civil lawsuit against another private party is not engaging in state action, or acting under color of state law. The only exception found by the courts is where a private litigant affirmatively exercises discriminatory peremptory challenges.

> Here, as in most civil cases, the initial decision whether to sue at all, the selection of counsel, and any number of ensuing tactical choices in the course of discovery and trial may be without the requisite governmental character to be deemed state action. That cannot be said of the exercise of peremptory challenges, however; when private litigants participate in the selection of jurors, they serve an important function within the government and act with its substantial assistance. If peremptory challenges based on race were permitted, persons could be required by

> summons to be put at risk of open and public discrimination as a condition of their participation in the justice system. The injury to excluded jurors would be the direct result of governmental delegation and participation.

Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 627-28, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991). *See also Georgia v. McCollum*, 505 U.S. 42, 54, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) ("The exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant's defense. In exercising a peremptory challenge, a criminal defendant is wielding the power to choose a quintessential governmental body").

Petitioners did not allege any impropriety with peremptory challenges exercised by State Farm. Instead, petitioners allege that the trial court's denial of petitioners' own challenges for cause denied them due process. State Farm took no action in making petitioners' challenges for cause, nor did State Farm have authority to deny them. The state court made the decision to deny petitioners' juror challenges.

Petitioners' reliance on *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982) is misplaced. In *Lugar*, the defendant sought prejudgment attachment under a procedure created by a Virginia statute. The procedure allowed a party to seize property by ex parte petition, without notice to the owner. A state court clerk issued a writ of attachment, and a county sheriff executed the writ.

The owner sued the defendant under 42 U.S.C. § 1983, alleging the defendant acted jointly with the state to deprive him of his property without due

process of law. This Court held that private use of unconstitutional state procedures with the help of state officials constitutes state action for purposes of the Fourteenth Amendment, and therefore the challenged conduct was "under color of state law." To act under color of state law, the private party must 1) deprive the plaintiff of a constitutional right through the exercise of a right or privilege having its source in state authority; and 2) be appropriately characterized as a "state actor." The court noted that a cause of action alleging violation of a state statute was insufficient. However, the claim alleged in that case, that a private party utilized an unconstitutional state procedure in joint participation with state officials, did satisfy the two-part test. *Lugar*, 457 U.S. at 939-41.

This case is very different. First, State Farm did not exercise a right or privilege having its source in state authority. Petitioners alleged they "sued State Farm for coverage," and "the judge allowed [jurors] to stay on the jury despite strenuous objection and motions by Petitioner's counsel before the actual trial began." (Record 4 – Complaint p. 3) Petitioners sued State Farm in their choice of forum, state district court. Petitioners challenged jurors. The court denied their challenges.

State Farm did not choose to be sued. State Farm did not make a motion asking the court to seat biased jurors. Petitioners' allegation that State Farm took litigation positions opposing their objections and motions is insufficient to establish that State Farm violated their rights, or acted under color of state law. The complaint failed to state a claim upon which relief may be granted, and failed to establish jurisdiction.

E. EVEN IF *ROOKER-FELDMAN* DID NOT APPLY, THE RESULT WOULD BE THE SAME BECAUSE PETITIONERS § 1983 CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS.

Even if the district court had jurisdiction, the result would be the same because petitioners' claim under 42 U.S.C. § 1983 is barred by Washington's three-year personal injury statute of limitations. The jury was selected in the state court action on June 25 and 26, 2001. (Record 24, 30) Judgment was entered on the verdict on August 2, 2001. (Record 62) Appellants filed this action on or about April 13, 2006, more than four years later. (Record 99) This claim is time barred.

The state statute of limitations for personal injury actions applies to actions for damages under 42 U.S.C. § 1983. *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985). Where state law provides multiple statutes of limitations for personal injury actions, courts use the general or residual statute for personal injury actions. *Owens v. Okure*, 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989). In Washington, personal injury actions are governed by a three-year statute of limitations. WASH. REV. CODE §4.16.080(2); *Petcu v. State*, 121 Wn. App. 36, 68, 86 P.3d 1234, *rev. denied*, 152 Wn.2d 1033 (2004).

"Although state law determines the length of the limitations period, federal law determines when a civil rights claim accrues." *Morales v. City of Los Angeles*, 214 F.3d 1151, 1153-54 (9th Cir. 2000). Where the plaintiff alleges that a civil rights violation caused him to lose a lawsuit, the civil rights cause of action accrues on the date judgment was entered in that lawsuit. *Id.* at 1154. Since

petitioners sued more than three years after entry of judgment, their claim is time barred.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

DATED this 24th day of July, 2008.

Respectfully submitted,

MICHAEL S. ROGERS
Counsel of Record
REED McCLURE
TWO UNION SQUARE
601 UNION ST., SUITE 1500
SEATTLE, WA 98101-1363
(206) 292-4900